89-448

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

W. DON WELCH, Executive Director, South Carolina State Ports Authority, HENRY TECKLENBURG, JR., DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, JOSEPH P. GRIFFITH, and HARRY A. CHAPMAN,

Petitioners,

v.

SAMUEL COAKLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

I. DID THE FOURTH CIRCUIT ERR IN DENYING THE ELEVENTH AMENDMENT IMMUNITY OF A STATE OFFICIAL IN AN ACTION FOR REINSTATEMENT BY A STATE EMPLOYEE CLAIMING HE WAS DISCHARGED WITHOUT DUE PROCESS?

PARTIES

The following parties to the proceeding in the Fourth Circuit are not named in the caption: the South Carolina State Ports Authority, Thomas F. Hartnett, Theodore Guerard, and Ernest L. Willis. These parties are defendants who were dismissed by the district court. The individuals named above are all members of the Board of the South Carolina State Ports Authority.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
CITATIONS TO OPINIONS BELOW . .	2
JURISDICTION	2
CONSTITUTIONAL PROVISION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT. .	10
A. THE COMPLAINT DOES NOT ALLEGE AN ONGOING VIOLATION OF THE CONSTITUTION. .	13
B. THE ALLEGED CONSTITUTIONAL VIOLATION IS INAPPROPRIATE FOR INJUNCTIVE RELIEF	21
C. THE PRESENT CLAIM PLACES AN UNACCEPTABLE BURDEN ON PROTECTED STATE INTERESTS. . .	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES	Page
Coakley v. Welch, 877 F.2d 304 (4th Cir. 1989).....	2,10,18
Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541, 69 S. Ct. 1221 (1949).....	7
Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498 (1980).....	18,20,21
Green v. Mansour, 474 U.S. 1301, 106 S. Ct. 423 (1985), reh'g denied, 474 U.S. 111, 106 S. Ct. 900 (1986).....	7,8,9, 12,13, 14,23, 24
Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982).....	27,28
McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987), cert. denied sub nom. Kilgore v. Virginia State Board of Elections, ____ U.S. ____, 108 S. Ct. 1731 (1988).....	8,9
Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985).....	27,28

CASES:	Page
Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932 (1986).....	7,9,12, 14,16 17,18, ... 21,22
Penhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900 (1984).....	11
United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S. Ct. 1885 (1977).....	18,19
Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908).....	7,11,13 ..... 16,22, ... 25,26, ... 27
STATUTES:	
42 U.S.C. § 1983.....	4
RULES AND REGULATIONS:	
Rule 17.1(c), Rules of the Supreme Court.....	10

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Petitioners,

v.

SAMUEL COAKLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States

Court of Appeals for the Fourth Circuit, entered in the above-captioned action.

OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals is reported at 877 F.2d 304 (4th Cir. 1989). The slip opinion is reproduced in the Appendix at page 1a. The decision of the district court from which appeal was taken is not officially reported and is reproduced in the Appendix at page 19a.

JURISDICTION

The decision of the Fourth Circuit from which review is sought was entered June 9, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

At issue in this petition is the application of the eleventh amendment to the United States Constitution, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Respondent Samuel Coakley was discharged from his employment with the South Carolina State Ports Authority (hereinafter "SPA") in December 1986 after management concluded that he had solicited bribes from truck drivers. Respondent appealed his discharge under the SPA's grievance procedure. At the

grievance hearing before an employee panel in February 1987, a representative of the SPA's personnel department served as Respondent's advocate before the panel, assisting in the presentation of witnesses and other evidence. During the hearing, Respondent's personal attorney was permitted to counsel and advise Respondent but was not otherwise allowed to participate. After the hearing, Respondent's request for a copy of the employee panel's confidential recommendation was denied. After exhausting all steps of the grievance procedure, Respondent's discharge was upheld.

Respondent filed a lawsuit in federal district court under 42 U.S.C. § 1983 alleging that his discharge had

violated due process. Several state law causes of action were appended to the constitutional claim.[1] The Complaint named as Defendants the SPA, Executive Director Don Welch, and present members of the SPA Board. Under state statute, the Governor of South Carolina appoints each Board member to serve seven-year terms. The relief sought in the Complaint included lost wages and other monetary damages, as well as reinstatement.

---

[1] Notwithstanding the multistep grievance proceedings, including extensive direct and cross-examination of truck drivers who accused him of soliciting bribes, Respondent's basic claim in federal court is that the SPA did not have "good cause" for his discharge. Although not dispositive of the eleventh amendment immunity claim herein, this ultimate claim can bear heavily upon considerations of res judicata and the sensitive balancing of federal and state interests, two matters discussed more fully at pages 23-26, supra.

Petitioners moved to dismiss the action based on grounds of eleventh amendment immunity. In a decision dated July 18, 1988, Petitioners' motion was denied as to Welch and each of the other Petitioners herein. The district court granted the motion as to the SPA, finding it to be an agency of the state, and as to three individual Defendants because they had not been Board members at the time of Respondent's discharge. The district court held that the action could go forward against Welch and the remaining Board members[2] "for the prospective relief of reinstatement."

---

2 The record before the district court affirmatively established that neither Welch nor any Board member had any actual personal involvement in Respondent's discharge or grievance proceedings.

Petitioners filed an interlocutory appeal under the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221 (1949), challenging the district court's denial of Petitioners' eleventh amendment immunity. Petitioners argued that the Complaint's allegations did not state a claim cognizable under the exception to eleventh amendment immunity recognized in Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908). Among other arguments, Petitioners emphasized that recent Supreme Court decisions had required that an ongoing violation of the Constitution be found in order to authorize application of Young. Papasan v. Allain, 478 U.S. 265, 106 S. Ct. 2932 (1986). Green v. Mansour, 474 U.S.

1301, 106 S. Ct. 423 (1985), reh'g denied, 474 U.S. 111, 106 S. Ct. 900 (1986). Under these decisions, Petitioners urged that the discrete and self-contained act of discharge, occurring at one time in the past, cannot constitute an ongoing violation of the Constitution.

The three-judge panel of the Fourth Circuit rejected Petitioners' immunity claim by relying upon its prior decision in McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987), cert. denied sub nom. Kilgore v. Virginia State Board of Elections, __ U.S. __, 108 S. Ct. 1731 (1988). In McConnell, the Fourth Circuit upheld a decision ordering the reappointment of two county registrars

who had failed to be reappointed by their electoral boards after the governor's office was won by the opposing political party. Virginia law required that a majority of the members of city and county electoral boards be members of the current governor's party. The McConnell decision failed to discuss either Papasan or Green or their requirement of an ongoing violation. In holding that the present case was controlled by its McConnell decision, the Fourth Circuit appeared to recognize its earlier decision's failure to address the requirements of an ongoing violation in the following comment:

> We cannot see how Virginia's failure to reappoint the registrars is any more an "ongoing violation" of federal law than South Carolina's decision to fire Coakley.

877 F.2d at 307. Following the Fourth Circuit's subsequent denial of Petitioners' motion for a stay, which the court construed as a motion to recall and stay the mandate, the present petition was filed.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 17.1(c) of the Rules of this Court, certiorari can be granted where a lower court's decision is in conflict with this Court's decisions involving significant constitutional claims such as eleventh amendment immunity. The eleventh amendment immunity of a state and its agencies is well-settled:

> [I]n the absence of consent[,] a suit in which the State or one of its agencies or departments

is named as the defendant is proscribed by the Eleventh Amendment.

Penhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984). This rule applies whether the relief sought is legal or equitable. 465 U.S. at 100-101, 104 S. Ct. at 907-09. In Ex parte Young, the Supreme Court held that a suit to enjoin as unconstitutional a state official's enforcement of a state statute was not barred by the amendment. Young, 209 U.S. at 158-60, 28 S. Ct. at 453-54. However, subsequent decisions by this Court make clear that the Young exception to eleventh amendment immunity has a very narrow application. In determining the applicability of Young, the Court's recent inquiry has focused on

several areas: (1) whether there is an ongoing violation of federal law alleged by the Complaint; (2) whether injunctive relief is an appropriate remedy for that alleged violation; and (3) whether the proposed relief will upset the balance of state and federal interests embodied in the eleventh amendment. See Papasan, 478 U.S. at 277-79, 106 S. Ct. at 2932-40; Green, 474 U.S. at 68-71, 106 S. Ct. at 425-27. The decision by the Fourth Circuit in the present case directly conflicts with applicable decisions by the Supreme Court concerning the resolution of these issues.

A. THE COMPLAINT DOES NOT ALLEGE AN ONGOING VIOLATION OF THE CONSTITUTION

In Green, this Court emphasized that the proper application of Young "gives life to the Supremacy Clause," noting:

> Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

474 U.S. at 68, 106 S. Ct. at 426 (emphasis added) (citations omitted). Because the alleged violation in Green occurred in the past, relief under Young was found to be improper. As stated by this Court:

> Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available.

Green, 474 U.S. at 71, 106 S. Ct. at 427 (emphasis added). Similarly, in Papasan, the Court has more recently stated:

> . . . Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . . .

478 U.S. at 277-78, 106 S. Ct. at 2940 (emphasis added). The decision of the Fourth Circuit in the present case cannot be reconciled with these requirements of Green and Papasan.

The due process violations alleged by Respondent occurred, if at all, in December 1986 when he was discharged or,

at the latest, in February 1987 when the employee grievance panel hearing was concluded. Nothing in the Complaint alleges ongoing conduct by Petitioners that purportedly violates federal law.

Respondent argued before the Fourth Circuit that Petitioners' failure to rehire him--although he never applied to be rehired--somehow constitutes a present constitutional violation. This bootstrapping argument intentionally attempts to substitute Respondent's requested "remedy" of reinstatement for the "wrong" alleged in Respondent's lawsuit. A request for a prospective remedy should not be permitted to transform actions that Respondent's own Complaint alleges occurred in the

past[3] into ongoing illegal conduct merely to fit into the narrow parameters of Young and thus avoid the amendment's bar. As noted by the Supreme Court regarding the applicability of Young, "[i]n discerning on which side of the line a particular case falls, we look to the substance rather than to the form of the relief sought." Papasan, 478 U.S. at 279, 106 S. Ct. 2940-41.

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3 Interestingly, the Complaint used the "past" tense in describing Petitioners' conduct which allegedly violated due process. Even Respondent's prayer for relief acknowledged the completed nature of the alleged wrong:

> 42. Plaintiff prays for the following relief:
>
> (a) a declaration that he was terminated without cause, and that he was denied procedural due process . . . .

In an apparent effort to reconcile its decision with Papasan, the Fourth Circuit opinion in the present case notes:

> We recognize that from one point of view, all Coakley has alleged is that for a period in the past the SPA put him through a process that deprived him of due process rights, but that the process, and any relationship between him and SPA, has ended. This would suggest that his suit against Welch is barred for want of an "ongoing" violation. The view we find more consistent with Papasan and McConnell is that by his allegations and his prayer for an injunction, Coakley has alleged SPA conduct that, while no longer giving him daily attention, continues to harm him by preventing him from obtaining the benefits of SPA employment.

877 F.2d at 307 n.2. Thus the panel of judges adopted Respondent's bootstrap argument that tries to substitute his desired remedy for the alleged wrong. This focus by the Court on the remedy, rather than the alleged violation, clearly demonstrates the fundamental error of its decision. Focusing on the present effects of Respondent's past discharge simply misses the point of this Court's requirement of an ongoing constitutional violation. Papasan, 478 U.S. at 277, 106 S. Ct. at 2939-40.

Further, the Fourth Circuit's analysis is inconsistent with the reasoning of two additional leading Supreme Court cases, United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S. Ct. 1885 (1977), and Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498 (1980). In Evans, the Supreme Court

held that the continuing effects of a past unlawful employment decision do not amount to a "continuing violation" under the Civil Rights Act of 1964. As explained by the Court:

> United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists.

431 U.S. at 558, 97 S. Ct. at 1889 (emphasis in original). The Court further noted that a past violation "is merely an unfortunate event in history which has no present legal consequences." Evans, 431 U.S. at 558, 97 S. Ct. at 1889. In the present case, the Fourth Circuit's focus on the present impact of

Respondent's loss of "the benefits of SPA employment" misses the critical fact that the conduct challenged in his Complaint has ended.

Similarly, the claim of the plaintiff in Ricks as to the ongoing effects of the employer's failure to award him tenure was unpersuasive to the Supreme Court. In the words of this Court:

> It is simply insufficient for Ricks to allege that his termination "gives present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination." The emphasis is not upon the effects of earlier employment decisions; rather, it "is [upon] whether any present violation exists."

Ricks, 449 U.S. at 258, 101 S. Ct. at 504 (emphasis in original) (citations omitted). In focusing upon the present

effects of Respondent's past discharge, the Fourth Circuit committed the same error in reasoning as the plaintiff in Ricks. Certiorari should be granted to ensure consistency in the analysis of alleged continuing violations in the context of employment claims.

B. THE ALLEGED CONSTITUTIONAL VIOLATION IS INAPPROPRIATE FOR INJUNCTIVE RELIEF

The Complaint in the present case is further deficient in that the requested relief of reinstatement cannot be an appropriate remedy for the past violations alleged in the Complaint. In Papasan, this Court observed that "Young has been focused on . . . cases in which the relief against the state official directly ends the violation of federal

law . . . ." Papasan, 478 U.S. at 277-78, 106 S. Ct. at 2940 (emphasis added). A threshold problem under this standard in the present case is the absence of any ongoing violation alleged in the Complaint which can be enjoined. Moreover, the requested remedy of reinstatement goes too far and, thus, fails to meet this Court's criteria for applying the Young exception. See Papasan, 478 U.S. at 277, 106 S. Ct. at 2939-40. Awarding Respondent a job fails to address or attempt to correct the allegedly deficient process by which he was discharged, which is the past conduct that has been challenged in Respondent's constitutional attack.

The requested relief in the present case is inappropriate for another reason.

A judgment for Respondent in federal court could determine liability in a subsequent state court action for damages. This result was specifically disapproved by the Supreme Court in Green in the following terms:

> We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.

Green, 474 U.S. at 73, 106 S. Ct. at 428 (footnote omitted). Because a judgment for Respondent in federal court could determine liability in state court, the injunctive relief requested by Respondent should be unavailable. Any claim Respondent may have should be resolved in state court.[4]

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[4] Respondent's federal claim is necessarily dependent upon his ability to establish a property interest in his employment under state law. Respondent has in fact filed an action in state court seeking monetary damages for the same conduct that is the basis for the present action.

C. THE PRESENT CLAIM PLACES AN UNACCEPTABLE BURDEN ON PROTECTED STATE INTERESTS

Finally, there are compelling reasons for concluding that permitting the claim against Petitioners in the present case would impermissibly intrude on state interests protected by the eleventh amendment. If the Young doctrine is applicable to the facts alleged in Respondent's Complaint, state officials could be required to answer in federal court for any decision to discharge a state employee. An imaginative attorney would have no difficulty in including allegations of constitutional violations in a routine discharge case, and the availability of attorneys' fees under federal law would undoubtedly encourage

the filing of these increasingly common discharge cases in federal rather than state court.

The effect on the operation of state governments, and particularly their officials, of routinely having to defend employee discharge cases in federal court should be obvious. Even though monetary damages, other than attorneys' fees, would not be available, state officials would still be required to go through the litigation process with its demands on time and resources. Surely this prospect is inconsistent with the doctrine of qualified immunity, which offers some protection to other public officials but is inapplicable to an action against state officials under

Young. The doctrine of qualified immunity has been defined by this Court in such a manner as "to avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2738 (1982)). As further noted by the Court:

> [T]he "consequences" with which we were concerned in Harlow are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial--distraction of officials from their governmental

> duties, inhibition of discretionary action, and deterrence of able people from public service."

Mitchell, 472 U.S. at 526, 105 S. Ct. at 2815 (quoting Harlow, 457 U.S. at 816, 102 S. Ct. at 2737. A finding that the present case--and other similar suits for reinstatement by discharged state employees--are encompassed by Young is completely at variance with the above considerations.

CONCLUSION

Petitioners respectfully request that this Court grant certiorari to determine the eleventh amendment immunity of a state official against a claim

for reinstatement by a discharged state employee.

Respectfully submitted,

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August 31, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No.88-2905

Samuel Coakley, Plaintiff-Appellee,

versus

W. Don Welch, Executive Director, South Carolina State Ports Authority and; Henry Tecklenburg, Jr.; H. Don McElveen; Robert V. Royall, Jr.; James B. Moore; Joseph P. Griffith; Harry A. Chapman, members of the Board of the South Carolina State Ports Authority,

Defendants-Appellants,

and

South Carolina Ports Authority; Thomas F. Hartnett, member of the Board of the South Carolina Ports Authority; Theodore Guerard, member of the Board of the South Carolina State Ports Authority; Ernest L. Willis, member of the Board of the South Carolina State Ports Authority,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge. (CA-87-1442)

Argued: March 9, 1989 Decided: June 9, 1989

Before ERVIN, Chief Judge, CHAPMAN, Circuit Judge, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

James Bernard Spears, Jr., (HAYNSWORTH, BALDWIN, MILES, JOHNSON, GREAVES AND EDWARDS; William H. Vaughan, Jr., VAUGHAN, ROBSON & LAWRENCE on brief) for Appellants. Armand Georges Derfner for Appellee.

ERVIN, Chief Judge:

The issue in this appeal is whether the district court correctly refused to dismiss several officials of the South Carolina State Ports Authority ("SPA") from a suit brought by Samuel Coakley, a terminated SPA employee. The court concluded that the officials did not enjoy eleventh amendment immunity from an action for injunctive relief. The court also refused to conclude that the officials had no part in the decision to terminate Coakley. We affirm.

I.

The SPA terminated Coakley, a cargo supervisor, in December, 1986, after three truckers claimed he had

forced them to pay bribes to have their trucks unloaded. Coakley demanded a hearing before an SPA panel, as was his right under SPA regulations. The panel recommended that the SPA's executive director confirm Coakley's termination. Confirmation occurred in March, 1987.

On June 1, 1987, Coakley initiated this § 1983 action, which includes a number of pendant claims. Coakley's federal claims were that he was terminated without cause, an event Coakley believes violated his right to due process, and that he was denied adequate pre- and post-termination process. Coakley's pendant claims alleged violations of analogous due process rights guaranteed under the

South Carolina Constitution and breach of an employment agreement. Coakley sought compensatory damages and an injunction ordering his reinstatement.

On the defendants' Fed. R. Civ. P.12(b)(6) motion, the district court dismissed the SPA, holding that it was a state agency immune from a damages suit under the eleventh amendment. The court also held that the individual defendants, sued in their capacity as SPA officials, could be subject to an injunction under the Ex parte Young, 209 U.S. 123 (1908), exception to eleventh amendment immunity. The court observed, however, that defendants Willis, Hartnett, and Guerard had not been SPA officials at the time of Coakley's

termination. The court therefore dismissed those three based on its conclusion that no theory of liability under § 1983 could implicate them.

The remaining individual defendants (collectively "Welch") appeal from the decision excepting them from eleventh amendment immunity and refusing to dismiss them for lack of personal involvement. The district court did not certify its decision, so its order is appealable, if at all, under the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

II.

A. Appealability

In Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69 (1978), the court held that an order preceding a final decision on the merits is immediately appealable under Cohen if it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action and [will] be effectively unreviewable on appeal from a final judgment." (citations omitted). Eleventh amendment immunity is a form of absolute immunity, expressed as a limit on the jurisdiction of the federal courts. Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982). Orders denying claims

of absolute immunity are, as a general matter, immediately appealable under Cohen. Nixon, 457 U.S. at 742-44; Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1989); Foremost Guar. Corp. v. Community Sav. & Loan, 826 F.2d 1383, 1386 (4th Cir. 1987). We find no serious contention that the order denying immunity in this case does not fulfill the Cohen criteria, and accordingly accept Welch's appeal from the order.

We reject, however, Welch's contention that the second issue he would have us resolve is appealable at this time. Welch's absolute immunity argument amounts to a claim that he should not have to go through a trial,

or indeed any federal judicial proceedings. See Mitchell v. Forsyth, 472 U.S. 511, 519 (1985). Unlike the jurisdictional defense of absolute immunity, though, a claim of lack of personal involvement is a merits defense in a § 1983 action, and Welch remains free to present the defense in a motion for summary judgment or at trial. We would be better able to review the district court's treatment of the defense, which will ultimately stand or fall on the evidence of Welch's position at the time of Coakley's termination, on an appeal from a final judgment than on the slim record before us today. For these reasons, we decline to entertain Welch's appeal from the portion of the district court's order that denied him

dismissal for lack of personal involvement.[1]

B. Eleventh Amendment

Coakley granted to the district court that a decision barring his damages action against the SPA on eleventh amendment grounds would equally

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[1] We cannot agree with Welch that we have broad discretion to elect to reach the merits defense now. Kerr Center Parents Assoc. v. Charles, 842 F.2d 1052, 1059 (9th Cir. 1989), the case Welch cites for the proposition of discretionary appellate jurisdiction, is not on point. Kerr arose from orders of summary judgment that completely resolved the matter before the district court. A panel of the Ninth Circuit concluded the district court had erred in holding the State of Oregon not immune from suit under the eleventh amendment. The panel therefore remanded on that issue, and went on to address other issues that would arise if the district court again held, on legitimate grounds, that Oregon was not immune. These issues were not "interlocutory," though, arising as they did from a final, albeit reversed, judgment.

bar a damages action against Welch. The decision as to damages having favored Welch, the only question for us is whether the court ought also to have held Welch immune from Coakley's claim for the injunctive remedy of reinstatement. We believe the district court was correct to permit Coakley to pursue injunctive relief.

Papasan v. Allain, 478 U.S. 265 (1986), and McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987), cert. denied, _____ U.S. _____, 108 S.Ct. 1731 (1988), supply authority on this issue. Papasan indicates that Coakley has alleged a claim that falls within the purview of the Young exception. All that this requires is an assertion that "the

underlying authorization upon which the named official acts is . . . illegal." Id. at 277. The SPA regulations containing the hearing requirement that Coakley believes flouts due process supply an underlying authorization.

Papasan held, though, that "the balance of federal and state interests that [Young] embodies" recommends applying the Young exception only to cases alleging ongoing violations of federal law. Id. Papasan offered as a final observation on the matter that the difference between suits barred and litigable "will not in many instances be that between day and night." Id. at 278 (quoting Edelman v. Jordan, 415 U.S. 651, 667 (1974)). The narrow

issue with which we must grapple, then, is the shadowy one of whether Welch has alleged an "ongoing violation" of law.

Papasan was an equal protection suit brought by a number of Mississippi municipal school officials and school children against various officials of the State of Mississippi. The suit alleged that a history of poor treatment by the State, amounting to a breach of trust, had resulted in severe financial disadvantages to the plaintiffs' school districts.

The Court found the defendants subject to suit under the eleventh amendment, holding that the "alleged ongoing constitutional violation -- the unequal distribution by the State of the

benefits of the State's school lands -- is precisely the type of continuing violation for which a remedy may permissibly be fashioned under Young." 478 U.S. at 282. The Court found the essence of the complaint to be the present, and presumably ongoing, disparity in educational opportunity, and not the past actions of the State that had created the disparity. Id.

McConnell was an action brought by two former Virginia county registrars, both Republicans, who were not reappointed by their electoral boards after a Democratic governor took office. A Virginia statute required that a majority of the members of city

and county electoral boards be members of the governor's party.

The McConnell panel affirmed a judgment holding that the registrars' rights had been violated and ordering reappointment. The panel held, as to the remedial aspect, that "[Virginia's] eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct. . . ." 829 F.2d at 1329-30 (citing Young).

McConnell is similar enough to this case to control, Welch's attempts to distinguish it notwithstanding. In this case, SPA regulations provide the underlying State authority for the conduct Coakley asserts deprived him of

federal constitutional rights. We cannot see how Virginia's failure to reappoint the registrars is any more an "ongoing violation" of federal law than South Carolina's decision to fire Coakley.[2] For these reasons,

---

2 We recognize that from one point of view, all Coakley has alleged is that for a period in the past the SPA put him through a process that deprived him of due process rights, but that the process, and any relationship between him and SPA, has ended. This would suggest that his suit against Welch is barred for want of an "ongoing" violation. The view we find more consistent with Papasan and McConnell is that by his allegations and his prayer for an injunction, Coakley has alleged SPA conduct that, while no longer giving him daily attention, continues to harm him by preventing him from obtaining the benefits of SPA employment. See also Elliott v. Hinds, 786 F.2d 298,302 (7th Cir. 1986)("Elliott's alleged wrongful

FOOTNOTE CONTINUED ON NEXT PAGE

McConnell provides clear authority for the district court's decision.

III.

For the foregoing reasons, we address and affirm the district court's decision denying Welch eleventh amendment immunity from Coakley's claim ~~for injunctive~~ relief. We decline to

discharge is a continuing violation; so long as the state official keeps him out of his allegedly tenured position the official acts in what is claimed to be derogation of Elliott's constitutional rights."); Dwyer v. Regan, 777 F.2d 825, 836 (2d Cir. 1985).

Cases from other circuits, as well as McConnell, suggest that few, if any, suits are barred for failure to allege an "ongoing violation" under Papasan. See Elliott, 786 F.2d at 301-302; Dwyer, 777 F.2d, at 836. Quite logically, the courts treat the issue of whether a violation is "ongoing" as related to the issues of whether prospective relief is appropriate, or whether the requested relief would operate instead as an illegitimate award of retroactive damages.

address at this stage the propriety of the order declining to dismiss Welch for lack of personal involvement in the decision to terminate Coakley.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

SAMUEL COAKLEY, Plaintiff, vs. SOUTH CAROLINA STATE PORTS AUTHORITY; W. DON WELCH, Executive Director, and HENRY TECKLENBURG, JR., H. DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, THEODORE GUERARD, ERNEST L. WILLIS, JOSEPH P. GRIFFITH, HARRY A. CHAPMAN, and THOMAS F. HARTNETT, Members of the Board of the South Carolina State Ports Authority, Defendants.	)	CIVIL ACTION NO. 2:87 1442-2 ORDER

Plaintiff is a former employee of the South Carolina State Ports Authority (SPA) and has brought this

suit under 42 United States Code section 1983 challenging the constitutionality of his termination. Plaintiff seeks, inter alia, reinstatement, back pay, and damages. The defendants are the SPA, its Executive Director, and members of the SPA Board of Directors as of June 1, 1987. The individual defendants are all sued in their official capacities only.

This matter comes before the court now on defendants' motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. A hearing was held on this matter in Charleston, South Carolina, on May 31, 1988. Defendants move to dismiss this action on the ground that SPA is an agency or alter ego of the State of

South Carolina, and, therefore, is immune from suit in federal court under the protection of the Eleventh Amendment. Further, the individual defendants argue that they are also immune from suit because they are being sued in their official capacities, which is actually just another way of suing the State, and, therefore, is barred by the Eleventh Amendment. The individual defendants also rely on the additional ground that they had no personal involvement in the alleged violation of plaintiff's rights, as is required to impose liability under section 1983, and, on its face, the complaint does not allege any personal involvement on their part.

Plaintiff argues that the SPA is not the alter ego or agency of the State and, consequently, is not entitled to Eleventh Amendment protection. Plaintiff further contends that even if the court finds the Eleventh Amendment does apply to the SPA, prospective equitable relief (i.e., reinstatement) can be granted against the individual defendants under the teachings of Ex parte Young, 209 U.S. 123 (1908).[1] Finally, plaintiff argues that defendants' contention that individual officials cannot be sued without a showing of personal involvement relies

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1 The basic doctrine of Ex parte Young is that a federal court is not barred by the Eleventh Amendment from enjoining state officers from acting unconstitutionally.

on cases involving damage claims against officials in their personal capacities whereas, here, defendants are being sued only in their official capacities and equitable relief is available against them under section 1983, regardless of whether the Eleventh Amendment bars plaintiff's claims for damages. While the Fourth Circuit has recognized that many factors must be considered in determining whether an entity is an alter ego or agency of the state, that court has specifically identified and discussed four principal factors.

> [I]t is generally held that the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded. . . . We agree that this is a

> most important consideration for "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest." Ford Motor Co., 323 U.S. at 464, 65 S.Ct. at 350. Other important inquiries underlying our consideration of eleventh amendment immunity include, but are not necessarily limited to, whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law.

Ram Ditta v. Md. Nat. Capital Park & Planning Comm., 822 F.2d 456, 457-58 (4th Cir. 1987) (footnotes omitted).

In applying these factors to the SPA, plaintiff first argues that the State Treasury is not responsible for the SPA's expenditures, as explicitly

commanded by S.C. Code Ann. section 54-3-140(9) (1976). Plaintiff's Opposition to Defendants' Motion to Dismiss at 7. That section reads in full:

> In order to enable it to carry out the purposes of this chapter, the authority: [m]ay apply for and accept loans and grants of money from any Federal agency for any and all of the purposes authorized in this chapter and expend such moneys in accordance with the directions and requirements attached thereto or imposed thereon by any such Federal agency and give such evidences of indebtedness as shall be required by any such Federal agency, except that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the

> State, or any political subdivision thereof; . . . . (emphasis added).

This section appears to be restricting the SPA with regards to loans and grants from a federal agency, however, there is nothing to indicate that this language is to be read any broader than that or as broad as plaintiff contends. To the contrary, the affidavit of the Chief Financial Officer of the SPA avers that the South Carolina General Assembly appropriated $750,000 for the initial operation of the SPA and made annual appropriations for its operations from 1942 to 1959. Affidavit of William M. Lawrence at ¶¶ 5, 10. Since 1959, the General Assembly has made annual appropriations to pay the principal and

interest on general obligation bonds of the State issued to finance capital improvements for the SPA. Id. at ¶ 6. The State has issued a total of $105,644,834.30 worth of said bonds to finance SPA's capital improvements, and the proceeds of these bonds were deposited in the State Treasury and distributed to the SPA at the direction of the General Assembly. Id. at ¶ 7. Although it appears that the operations of the SPA are now essentially self-sustaining,[2] plaintiff has

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2 All net earnings of SPA not needed for the operation of its business have been paid into the State Treasury and held subject to further action of the General Assembly; since its creation, SPA has paid a total of $1,552,880.62 of

FOOTNOTE CONTINUED ON NEXT PAGE

failed to establish clearly that the State would not ultimately be responsible for SPA's expenditures, including any judgment that might be awarded against it.

Another factor to consider under Ram Ditta is whether the entity exercises a significant degree of autonomy from the state. Plaintiff argues that the SPA has the power to sue and be sued, to make contracts, to acquire and dispose of real estate, and its budget is approved only by its own board, rather than the State Budget and Control Board. Plaintiff's Opposition to Defendants' Motion to Dismiss at 8.

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such net earnings into the State Treasury. Affidavit of William M. Lawrence at ¶ 4.

On the other hand, SPA was created by statute as an "instrumentality of the State" for the purpose "[i]n general to do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State." S.C. Code Ann. § 54-3-130(9). SPA is governed by a board whose members are appointed by the governor with the consent of the Senate. § 54-3-20. Its property is not subject to any taxes or assessments, § 54-3-1050, and all net earnings "not necessary or desirable for the operation of its business shall be held subject to the further action of the General Assembly." § 54-3-1020. Further, the

SPA has been given broad power of eminent domain "not only as to all property of private persons or corporations but also as to property already devoted to public use." § 54-3-150. Based on the foregoing, we are not persuaded that the SPA exercises a significant degree of autonomy from the State; although it appears that SPA enjoys a certain degree of independence, it is apparent that SPA is not significantly autonomous and shares to a great extent in the States's sovereignty.

A third consideration under Ram Ditta is whether the entity is involved with local versus statewide concerns. Here, it is clear that SPA operates and maintains South Carolina's

ports for the benefit of the entire State[3] and, consequently, it is primarily involved with statewide concerns.

The final Ram Ditta factor to consider is how the governmental entity

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[3] See. e.g., § 54-3-110. State may improve harbors and seaports through Authority.

> Through the Authority the State may engage in promoting, developing, constructing, equipping, maintaining and operating the harbors or seaports within the State, namely Charleston, Georgetown and Port Royal, and works of internal improvement incident thereto, including the acquisition or construction, maintenance and operation at such seaports of harbor watercraft and terminal railroads, as well as other kinds of terminal facilities, and belt line roads or highways and bridges thereon and other bridges and causeways necessary or useful in connection therewith.

is treated as a matter of state law.[4] Neither party, however, cites South Carolina case law to support its position, and the court was unable to find any such cases on point. Plaintiff primarily relies upon a district court case from the Southern District of New York, Doris Trading Corp. v. S.S. Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y. 1976), and an opinion letter from the South Carolina Attorney General's

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[4] Although this is a consideration, the question of whether an entity is an agency or alter ego of the State is a question of federal, not state, law. Ram Ditta, 822 F.2d at 458 n.5 quoting Blake v. Kline, 612 F.2d 718, 722 (3rd Cir. 1979), cert. denied, 447 U.S. 921 (1980).

Office dated December 8, 1987.[5]

Plaintiff acknowledges, though, that federal district courts in the District

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[5] The SPA had instituted an executive incentive pay plan whereby its top executives would receive additional compensation based upon the SPA's annual income and the executives' annual salaries. The SPA Board asked the Attorney General's Office for its opinion as to the constitutionality of said practice. In its letter of December 8, 1987 to SPA Board member Thomas F. Hartnett, the Attorney General's Office concluded:

> that the executive incentive pay plan adopted by the governing body of the South Carolina State Ports Authority would probably not be violative of Article III, Section 30 of the State Constitution or Section 8-15-10 of the Code because the extra compensation would be for services to be rendered in the future by Authority employees who would probably not be considered to be state employees.

of South Carolina have consistently held that the SPA is protected by the Eleventh Amendment, and defendants rely, inter alia, on such cases, e.g. South Carolina State Ports Authority v. Seaboard Air Line Railroad Co., 124 F. Supp. 533 (E.D.S.C. 1954). Of course, none of the authorities cited by either party is binding on this court and, further, they do not evidence how the SPA is treated by the South Carolina state courts.

Although a state court's view of the status of a governmental entity is a factor for a federal court to consider under the Ram Ditta guideline, questions of Eleventh Amendment immunity are ultimately governed by federal law,

Ram Ditta, 822 F.2d at 460, and, consequently, this particular factor is probably the least important one in the alter ego equation. For example, in Ram Ditta the Court of Appeals of Maryland had held that the governmental entity in question in that case was a state agency and, in turn, the district court relied heavily on that state court's decision in finding that the park commission was entitled to Eleventh Amendment immunity. On appeal, the Fourth Circuit reversed and concluded that the park commission was not the alter ego of the state because the other three factors, i.e., the state treasury's responsibility for any judgment, the commission's autonomy from

the state, and the nature of the commission's functions, all weighed heavily against Eleventh Amendment immunity. Id.

Similarly, in the instant case, our inquiry must go beyond that single factor of how the SPA may be treated by the state courts and consider "all factors bearing on the federal policy entitling appropriate governmental entities to eleventh amendment immunity." Id. Balancing all of these criteria, we conclude that the SPA is an agency of the State of South Carolina and, accordingly, is entitled to Eleventh Amendment immunity. Consequently, defendants' motion to dismiss

this action as to defendant SPA must be granted.

We are still left to consider defendants' motion as to the individual defendants sued only in their official capacities. Plaintiff has already acknowledged that if the court finds that SPA is protected by the Eleventh Amendment, as we have found, then plaintiff could not recover damages against these individual defendants in their official capacities, since such an award would be tantamount to a judgment against the State and, therefore, also prohibited by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159, 165-66 (1985) (plaintiff seeking to recover on a damages judgment in an official-

capacity suit must look to the government entity itself), see also, McConnell v. Adams, 829 F.2d 1319, 1329 (4th Cir. 1987). Consequently, the issue remaining as to the individual defendants is whether this suit can be maintained against them only for the prospective relief of reinstatement.

Plaintiff argues that even where a state agency is immune from suit under the Eleventh Amendment, it has been clear since Ex parte Young, 209 U.S. 123 (1908), that prospective equitable relief can be granted against state officials for violations of the United States Constitution. In this case, plaintiff alleges violations of the Due Process Clause of the Fourteenth

Amendment, and thus contends that a suit for a prospective injunction, viz. reinstatement, lies against the individual members of the SPA Board and its executive director in their official capacities.

The holding in Ex parte Young was that a suit challenging the constitutionality of a state official's action is not one against the state. In that case, a federal court enjoined the Attorney General of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment, and the Supreme Court held that the Eleventh Amendment did not prohibit issuance of the injunction. The decision in Young was based on the

theory that an unconstitutional enactment is void and, therefore, does not "impart to him [the officer] any immunity from responsibility to the supreme authority of the United States." Id. at 160. Further, since the state could not authorize the action, the officer was "stripped of his official or representative character and subjected in his person to the consequences of his individual conduct." Id.

Not all forms of injunctive relief against state officials are available under the Young doctrine, though, because of the bar of the Eleventh Amendment. Consequently, in Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that when a

plaintiff sues a state official alleging a violation of federal law, the federal court could award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. The court explained the distinction, as follows:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex parte Young will not in many instances be that between day and night. The injunction issued in Ex parte Young was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions. Later cases from this Court have authorized equitable relief which has probably had greater impact on state

treasuries than did that awarded in Ex parte Young. . . . But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young, supra.

But that portion of the District Court's decree which petitioner challenges on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation. . . . While

> the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State.

Id. at 667-68.

The Young doctrine was recently illustrated in the Fourth Circuit case of McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987). In that case, employees of two Virginia county electoral boards were terminated, and they sued the electoral board members and general county registrar under section 1983 for damages and for an injunction to reinstate them. The Court of Appeals held that said defendants were acting as state employees and,

consequently, the district court erred in awarding damages against them in their official capacities because they were protected by the Eleventh Amendment. Id. at 1329. These defendants were not protected from injunctive relief under the Eleventh Amendment, however, because of the doctrine of Ex parte Young.

> The appellants' actions in failing to rehire the appellees violated the appellees' rights guaranteed by the first and fourteenth amendments. The decision of the district court finding such a violation is accordingly affirmed. Since the state's eleventh amendment immunity does not protect it from suits for injunctive relief governing its officials' future conduct, the order of the district court requiring the appellants to rehire the appellees is also affirmed. Ex parte Young, 209 U.S. 123,

28 S.Ct. 441, 52 L.Ed. 714 (1908).

Id. at 1329-30.

Based on the foregoing, we agree with plaintiff's position in the instant case, that if he can prove the individual defendants sued in their official capacities violated his federal constitutional rights, plaintiff would be entitled to seek prospective injunctive relief against said defendants. Defendants contend, however, that plaintiff will be unable to prove liability against them under section 1983 because plaintiff cannot show that they were personally involved in the alleged deprivation of plaintiff's rights, and, in fact, the complaint

fails even to allege any personal involvement on their part. Further, defendants argue that since section 1983 will not support a claim based on a respondeat superior theory of liability, see Monell v. Dep't. of Social Services of City of New York, 436 U.S. 658 (1978), plaintiff's complaint fails to state a cause of action against them, and the individual defendants should be dismissed. Plaintiff agrees with defendants that individual officials cannot be sued under section 1983 without a showing that they were personally responsible for plaintiff's injury when the plaintiff is seeking damages, but he argues that personal involvement is not a requirement under section 1983 when

the relief sought against the defendants is a prospective injunction. Plaintiff cites no authority for this position.

In considering a motion to dismiss, a complaint must be construed in the light most favorable to the plaintiff and its allegations are taken as true. 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1357 at 594. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cruz v. Beto, 405 U.S. 319, 322 (1972), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

As the defendants contend, the complaint in this case does not allege personal involvement by the individual defendants. The complaint does allege, however, that said defendants have "ultimate supervisory responsibility for SPA operations," Complaint ¶ 5, and it is well-established in the Fourth Circuit that under section 1983 "supervisory officials may be liable in certain circumstances for the constitutional injuries inflicted by their subordinates." Slakan v. Porter, 737 F.2d 368, 372 (4th Cir. 1984); see also Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980), cert. denied, 450 U.S. 929 (1981). Liability in this context is not based on respondeat superior, "but

on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict ..." Id. Supervisory liability in this context may extend to the highest levels of state government. Id. at 373. "The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked." Id. Consequently, this determination of liability generally turns on the facts and not law. Id.; see also Avery v.

County of Burke, 660 F.2d 111, 114 (4th Cir. 1981).

Turning to the facts here, according to ¶ 5 of plaintiff's complaint, defendants Willis, Hartnett, and Guerard were not members of the SPA Board at the time of the events alleged in the complaint. Consequently, said defendants could not be persons in the decision making chain whose supervisory indifference may have been a causative factor in the constitutional injuries allegedly inflicted on plaintiff. On the other hand, defendants Tecklenburg, McElveen, Royall, Moore, Griffith, and Chapman were members of the board at the time of said events and Welch was SPA's executive director; accordingly, these

defendants' supervisory indifference could have been a causative factor in this case.

The plaintiff must meet a heavy burden of proof in supervisory liability cases and, ordinarily, it cannot be satisfied by pointing to a single incident or isolated incidents. Slakan, 737 F.2d at 373. Still, in considering this complaint in the light most favorable to the plaintiff, it does not appear to us beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to the equitable relief requested. Cruz v. Beto, 405 U.S. at 322. Consequently, we must deny the individual defendants' motion to dismiss

as to defendants Welch, Tecklenburg, McElveen, Royall, Moore, Griffith, and Chapman. Said motion is granted, however, as to the defendants who were not members of the board at the time of the alleged events, viz., as to defendants Willis, Hartnett, and Guerard.

In summary, defendant SPA's motion to dismiss is granted because it is an agency of the State and, therefore, entitled to Eleventh Amendment protection. Similarly, the Eleventh Amendment protects the individual defendants sued in their official capacities from an award for damages. Plaintiff may, however, maintain its suit against the individual defendants

Welch, Tecklenburg, McElveen, Royall, Moore, Griffith, and Chapman for the prospective relief of reinstatement. Defendants Willis, Hartnett, and Guerard are dismissed from the case because plaintiff could not possibly prove supervisory liability against them under section 1983, since they were not members of the board at the time of the alleged events.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

DATED:

At Florence, South Carolina

July 15, 1988.